



MARYLAND
LEGAL AID

Preparing for the Journey

Beginning Legal Preparations

Presenter: Blake Fetrow

Attorney, Maryland Legal Aid (1996 – present)

Sources: Maryland Legal Aid's Elder Law Task Force and Long Term Care Program; AARP; People's Law Library



MARYLAND
LEGAL AID

Preparing for the Journey

Beginning Legal Preparations

What will we cover this morning?

- Discussion of preparations to be made in advance as a prospective caregiver/care recipient.
- How to have a discussion (“the Talk”) with your loved ones
- Basic legal documents that should be obtained/completed as part of preparation
- Discussion of what surrogate decision-making means and how it is applied



Beginning Legal Preparations

Introduction:

- Caregiving: Has potential to be arduous but also rewarding
- Advance preparations (legal and otherwise) can make the process less arduous



MARYLAND
LEGAL AID

Beginning Legal Preparations

Why don't people plan in advance?

- Lack of planning does not equal lack of commitment
- Thinking and talking about “what if?” can be depressing and cause conflict



MARYLAND
LEGAL AID

Beginning Legal Preparations

Why not just put it off for another day/a better time?

- Failing to plan for future responsibilities can make a bad situation worse
- A coordinated caregiving plan can prevent problems at home and at work
- Prior planning can reduce financial strain



MARYLAND
LEGAL AID

Beginning Legal Preparations

***Why not just put it off for another day/a better time?
(continued)***

- Aside from the emotional/ financial effects, there are potential legal consequences
- Waiting until after a loved one has lost decision-making capacity and/or the ability to communicate can take away the option of making documents like Advance Directives, Powers of Attorney, or even Wills
- You might then have to rely on Surrogate Decision Making (state law dictates who gets priority)



MARYLAND
LEGAL AID

Beginning Legal Preparations

How to approach the subject of caregiving with loved ones

- Prepare for the talk/discussion
 - Consider who should start the conversation
 - What are your concerns and priorities?
 - Best outcome of your conversation
 - Most difficult part of the conversation



MARYLAND
LEGAL AID

Beginning Legal Preparations

How to approach the subject of caregiving with loved ones

- Prepare for the talk/discussion (continued)
 - Worst outcome/what might happen as a result of conversation
 - How will your loved one and other family members react?
 - How do family members usually respond to uncomfortable subjects?
 - How to explain why it's important to have the discussion
 - Consider how much financial support (if any) you can give your loved one



MARYLAND
LEGAL AID

Beginning Legal Preparations

Other topics to discuss with loved ones (beyond caregiving)

- Possible goals & priorities list for your loved one (examples to check/discuss – in no particular order)
 - Remaining independent as possible for as long as possible
 - Remaining healthy/active
 - Living at home as long as possible
 - Working as long as possible
 - Community involvement/volunteering
 - Maintaining financial independence as long as possible
 - Taking classes
 - Starting my own business
 - Hobbies
 - Buying a second/vacation home
 - Moving closer to family
 - Relocate to a smaller home/residence
 - Retire elsewhere
 - Travel
 - Help my children/grandchildren



MARYLAND
LEGAL AID

Beginning Legal Preparations

If possible, take a team approach

- Effective caregiving plans need input and support of the care recipient *and* other family members (including “difficult” ones).
- Assemble the team (include the care recipient!)
- Having a team leader helps keep things moving



MARYLAND
LEGAL AID

Beginning Legal Preparations

Determine the needs of your loved one

- This can be difficult if done in advance, but you can still set priorities, figure out where your loved one wants to live, etc.
- Look for resources – divide tasks among the team
- Keep list of resources/personal information in a central location (have a list of where important documents are located)
- Keep checklists of possible needs/priorities (examples: General needs such as home maintenance, health care, transportation, personal care, finances) and assign point persons for each from the family caregiving team
- Determine what State/Federal benefits may be available
- AARP has some excellent checklists/resource lists



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents that can be helpful/crucial in caring for a loved one

- As previously noted, waiting until a loved one becomes mentally incapacitated, it can make executing legal documents difficult or impossible.
- Property/personal affairs related – General Durable Power of Attorney/Wills/Trusts
- Health care related documents: Advance Directive/Living Will/Health Care Power of Attorney/Medical Orders for Life Sustaining Treatment (MOLST)



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (property/personal affairs) - continued

YOUR WILL

- Writing a will is the only way to ensure that property subject to the probate process (almost all property other than property that had beneficiary designations or property that is titled jointly or in a life estate) is distributed according to an individual's wishes.
- When an individual dies with a will, this is considered dying testate. His/her property will be distributed according to the terms of his/her will.



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (property/personal affairs) - continued

YOUR WILL (if not done)

- If an individual dies without a will, he/she dies intestate.
- This means that the State will distribute his/her probate property according to a strict State distribution plan regardless of the individual's wishes.



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (property/personal affairs) - continued

YOUR WILL (if not done) = Intestacy

- Applies when person dies without a Will
- Personal Representative (PR) for estate is appointed by priority (established by Maryland laws)
- PR follows intestacy laws to determine how estate is to be distributed
- Law based on presumption of how individual would have distributed the estate



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (property/personal affairs) – continued: Maryland law of Intestacy

- If only spouse survives, spouse receives entire estate
- If spouse and minor child/children survive, spouse receives $\frac{1}{2}$ and child/children receive other $\frac{1}{2}$
- If spouse and adult children survive, spouse receives first \$15,000 plus $\frac{1}{2}$ of remaining probate estate and adult children receives remaining $\frac{1}{2}$
- If only children survive, children receive the entire probate estate
- If neither spouse nor children survive, estate distributed according to Md. ESTATES AND TRUSTS Code Ann. § 3-104 (parents → grandparents → great-grandparents)
- If no spouse, descendants or relatives survive, estate goes to the state of Maryland



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (property/personal affairs) –

continued: WILL REQUIREMENTS - MD requires every Will be:

- In writing; signed by the Testator; and attested and subscribed by two or more credible witnesses in presence of Testator
- Testator must have testamentary capacity (common law)
- “Whether a testator had sufficient mental capacity is determined by a consideration of his external acts and appearances. ”
- Full understanding of the nature of the business in which he was engaged
- Recollection of the property of which he intended to dispose and the persons to whom he meant to give it
- Understanding of relative claims of the different persons who were or should have been the objects of his bounty.



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (property/personal affairs) – continued

Power of Attorney (POA) - General

- A document in which you give someone legal authority to act for you.
- Allows you to assign someone to make decisions for you in case you are unable to make decisions for yourself.
- The person who grants the power of attorney is known as the "principal" and the person given the power is known as the "agent" or "attorney-in-fact."
- The power of attorney defines the limits of the power that the principal is giving to the agent. The power of attorney does not take away the principal's power to act; it only gives the agents the power to also act for the principal.



Beginning Legal Preparations

Legal documents (property/personal affairs) – continued

Power of Attorney (POA) – Statutory

- Maryland law provides statutory POA forms which, if used correctly, must be honored.
- POA may be either general or limited. A general POA gives a person the power and authority to act for the principal in ***all*** business and personal matters.
- A limited POA grants only the powers defined in the document.
- The POA may be limited either by the powers that the agent gets, or by time. Powers should be as specific as possible, both to protect the principal and to make it more likely that the people and businesses will honor the power of attorney.



Beginning Legal Preparations

Legal documents (property/personal affairs) – continued

Power of Attorney (POA) – Requirements

To create a power of attorney, an individual must:

- Be at least 18 years old;
- Intend to give the power to the person designated in the document; and
- Be mentally competent, which means
 - Able to understand the document;
 - Understand which powers are being granted; and
 - Understand which property is affected by the power granted.



Beginning Legal Preparations

Legal documents (property/personal affairs) – continued

Power of Attorney (POA) – Agent powers

- The powers of the agent should be described in detail in the POA. If there is a question about the limits of the powers granted by the power of attorney, the principal, agent, guardian of the principal, principal's family member, or a government agency may petition the court.
- Agents must keep a record of all receipts and transactions made for the other person. They must act loyally for the benefit of the principal's best interest and cooperate with the person who is empowered to make health-care decisions for the principal if there is one.
- The agent has a right to reimbursement for reasonable expenses paid while acting for the principal, but she has no right to payment beyond that unless it is included in the POA.



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (medical/health care) –

Advance Directive – what is it?

- An advance directive is a written or electronic document or oral directive that:
- Appoints a health care agent to make health care decisions - and/or:
- States the patient's wishes about medical treatments when the patient no longer has capacity to make decisions (living will)



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (continued) –

Are there other names for the Advance Directive?

- An advance directive has also been known as a durable medical power of attorney or a durable power of attorney for health care
- It is **not** a financial power of attorney



Beginning Legal Preparations

Legal documents (continued) –

Who can make an Advance Directive?

- In Maryland, any competent individual may make a written, electronic, or oral advance directive (but she must do it for herself)



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (continued) –

What are the legal requirements for a written Advance Directive?

- Signatures of patient and two witnesses with a date when signed
- Notary is not required, though a notary may be one of the two witnesses
- No required form (optional statutory form)
- Out-of-state advance directives are acceptable



Beginning Legal Preparations

Legal documents (continued) –

How does a person make an oral Advance Directive?

- An oral advance directive can be made in the presence of the attending physician or nurse practitioner plus one witness
- It must be documented in the individual's medical record
- It must be signed and dated by the physician or nurse practitioner that witnesses it



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (continued) –

Can an Advance Directive include wishes/ instructions regarding mental health?

- An advance directive may outline mental health services which may be given an individual in case of later incapacity to make health care decisions
- May designate an agent to make decisions about mental health services



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (continued) –

Which mental health preferences may be included in an Advance Directive?

- May identify preferred mental health professionals, programs, and facilities
- May state preferred medications
- May give instructions about notifying third parties and release of mental health information to third parties



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (continued) –

How can an Advance Directive be revoked?

A competent individual may revoke an advance directive at any time by:

1. Completing a new written or electronic advance directive; or
2. Giving an oral statement to a health care practitioner; or
3. Destroying all copies of the advance directive



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (continued) –

What is a Living Will?

A living will contains a patient's wishes about future health care treatments (often incorporated into the Advance Directive).

- It is usually written “if, then”:

“If: I lose capacity and I’m in (specified conditions),

Then: use or do not use a specific medical intervention”



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (continued) –

When does a Health Care Agent have authority?

The Advance Directive determines when the health care agent has authority

- “When I can no longer decide for myself”: The individual may decide whether one or two physicians must determine incapacity; OR
- “Immediately/Right away”: When the document is signed, the agent has authority



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (continued) –

How does a Health Care Agent make decisions for a patient

- The health care agent is to make decisions based on “wishes of the patient”
- If the patient’s wishes are “unknown or unclear,” then decisions are to be based on the “patient’s best interest”



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (continued) –

Is there an exception to following a Living Will?

- In some (rare) instances, a living will may allow the health care agent to act in the patient's best interest, regardless of what wishes are stated in the living will
- Most living wills are not written this way



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (continued) –

Can a Health Care Agent/Authorized Decision Maker revoke an Advance Directive?

- NO. An authorized decision maker cannot make or revoke a patient's Advance Directive



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (continued) –

What is the best evidence of a patient's wishes?

- If a patient loses capacity, the Advance Directive is the best available evidence of the patient's wishes
- But “Mom didn't understand what she signed” **NO**
- For person signing the Advance Directive, this dynamic is what makes it crucial that you select a Health Care Agent who understands and will honor your stated wishes, *no matter what*.



MARYLAND
LEGAL AID

Beginning Legal Preparations

Surrogate Decision Making

What happens if there is no Advance Directive or Health Care Agent, and the patient can't communicate her wishes?

- If no Advance Directive exists, and the patient is incompetent/can't communicate, Maryland Law allows for a Surrogate Decision Maker.
- Generally, this is a spouse or other family member (order of priority according to Maryland law).



MARYLAND
LEGAL AID

Beginning Legal Preparations

Surrogate Decision Making

If there is no health care agent, Maryland law specifies the type and order of the surrogate decision maker(s) as follows:

- 1) Guardian of the person**
- 2) Spouse or domestic partner**
- 3) Adult child**
- 4) Parent**
- 5) Adult brother or sister**
- 6) Friend or other relative**



MARYLAND
LEGAL AID

Beginning Legal Preparations

Surrogate Decision Making

What if there is a dispute among equally ranked surrogates?

- All surrogates in a category have the same authority
- All surrogates of equal authority must agree on a decision regarding life-sustaining interventions
- A physician may not withhold or withdraw life-sustaining procedures if there is disagreement among persons in the same class



MARYLAND
LEGAL AID

Beginning Legal Preparations

Surrogate Decision Making

How are disputes among equally ranked surrogates handled?

- The issue is referred to the patient care advisory committee
- Hospitals and nursing homes are required to have a patient care advisory committee
- Attending physician has immunity for following the recommendations of the patient care advisory committee



Beginning Legal Preparations

Surrogate Decision Making

Who is a Domestic Partner?

- Not related or married to the individual
- Gender irrelevant
- “In a relationship of mutual inter-dependence in which each contributes to the maintenance and support of the other”



MARYLAND
LEGAL AID

Beginning Legal Preparations

Surrogate Decision Making

Must Domestic Partner provide evidence of the relationship?

- Evidence about the relationship may be required
 - Affidavit
 - Financial documents
 - Health insurance coverage
- Spouses are not generally asked to produce a marriage license, so asking for evidence from a domestic partner is the exception rather than the rule



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (continued) –

May a friend or other relative serve as surrogate decision maker?

- A friend or other relative must present an affidavit demonstrating regular contact with the patient and familiarity with the patient's activities, health, and beliefs
- This affidavit should be placed in the medical record



MARYLAND
LEGAL AID

Beginning Legal Preparations

Surrogate Decision Making

How was the correct surrogate decision maker identified?

- The process that has been used in determining the correct surrogate decision maker should be documented in the medical record
- When the patient is transferred to another care setting, contact information for the surrogate decision maker should be sent to the receiving facility or program



MARYLAND
LEGAL AID

Beginning Legal Preparations

Surrogate Decision Making

What information shall surrogate decision makers consider?

1. Current diagnosis and prognosis
2. Expressed preferences
3. Relevant religious and moral beliefs and personal values
4. Behavior, attitudes, and past conduct with respect to the treatment at issue
5. Reactions to the treatment at issue or similar treatments
6. Expressed concerns about the effect on the family or intimate friends if a treatment were provided, withheld, or withdrawn



Beginning Legal Preparations

Surrogate Decision Making

What is not a basis for surrogates making health care decisions?

- An individual's preexisting, long-term mental or physical disability, or economic disadvantage should not be a basis for surrogates making health care decisions



MARYLAND
LEGAL AID

Beginning Legal Preparations

Legal documents (continued) –

MOLST – Medical Orders for Life Sustaining Treatment

- Maryland MOLST is a standardized medical order form covering options for cardiopulmonary resuscitation and other life-sustaining treatments
- It is a portable and enduring order form
- The orders are valid across the continuum of care in all health care settings and in the community throughout Maryland



Beginning Legal Preparations

Legal documents (continued) –

MOLST – Medical Orders for Life Sustaining Treatment (Benefits)

- Consolidates important information into orders
- It helps to standardize definitions
- Reminds patients and providers of available options
- Helps to increase the likelihood that a patient's wishes to accept, limit, or decline life-sustaining treatments are honored
- Usually executed at the facility prior to treatment/upon admission



MARYLAND
LEGAL AID

Beginning Legal Preparations

SUMMARY

- PREPARATION is key to caregiving:
 - Have “the Talk” (in advance if at all possible) with your loved one, focusing on their input/desires
 - Use a team approach, don’t do it all yourself
 - Encourage/help your loved one to get basic legal documents in order
- LEGAL DOCS: Advance Directive/Living Will, Appointment of Health Care Agent, MOLST, Power of Attorney (General or Limited)
- If no appointed Health Care Agent, law of surrogate decision-making may apply, or possibly guardianship



MARYLAND
LEGAL AID

Beginning Legal Preparations

Questions?